
ENGROSSED SENATE BILL 5623

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2023 Regular Session

By Senators Dhingra, Conway, Hasegawa, Kuderer, Lias, Lovelett, Nobles, Pedersen, Stanford, and C. Wilson

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1 AN ACT Relating to modifying an element of the offense of hate
2 crime and classifying a hate crime as crimes against persons; and
3 amending RCW 9A.36.080 and 9.94A.411.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 9A.36.080 and 2019 c 271 s 2 are each amended to
6 read as follows:

7 (1) A person is guilty of a hate crime offense if he or she
8 maliciously and intentionally commits one of the following acts
9 because of his or her perception of the victim's race, color,
10 religion, ancestry, national origin, gender, sexual orientation,
11 gender expression or identity, or mental, physical, or sensory
12 disability:

13 (a) (~~Causes physical injury to~~) Assaults the victim or another
14 person;

15 (b) Causes physical damage to or destruction of the property of
16 the victim or another person; or

17 (c) Threatens a specific person or group of persons and places
18 that person, or members of the specific group of persons, in
19 reasonable fear of harm to person or property. The fear must be a
20 fear that a reasonable person would have under all the circumstances.
21 For purposes of this section, a "reasonable person" is a reasonable

1 person who is a member of the victim's race, color, religion,
2 ancestry, national origin, gender, or sexual orientation, or who has
3 the same gender expression or identity, or the same mental, physical,
4 or sensory disability as the victim. Words alone do not constitute a
5 hate crime offense unless the context or circumstances surrounding
6 the words indicate the words are a threat. Threatening words do not
7 constitute a hate crime offense if it is apparent to the victim that
8 the person does not have the ability to carry out the threat.

9 (2) In any prosecution for a hate crime offense, unless evidence
10 exists which explains to the trier of fact's satisfaction that the
11 person did not intend to threaten the victim or victims, the trier of
12 fact may infer that the person intended to threaten a specific victim
13 or group of victims because of the person's perception of the
14 victim's or victims' race, color, religion, ancestry, national
15 origin, gender, sexual orientation, gender expression or identity, or
16 mental, physical, or sensory disability if the person commits one of
17 the following acts:

18 (a) Burns a cross on property of a victim who is or whom the
19 actor perceives to be of African American heritage;

20 (b) Defaces property of a victim who is or whom the actor
21 perceives to be of Jewish heritage by defacing the property with a
22 (~~swastika~~) Nazi emblem, symbol, or hakenkreuz;

23 (c) Defaces religious real property with words, symbols, or items
24 that are derogatory to persons of the faith associated with the
25 property;

26 (d) Places a vandalized or defaced religious item or scripture on
27 the property of a victim who is or whom the actor perceives to be of
28 the faith with which that item or scripture is associated;

29 (e) Damages, destroys, or defaces religious garb or other faith-
30 based attire belonging to the victim or attempts to or successfully
31 removes religious garb or other faith-based attire from the victim's
32 person without the victim's authorization; or

33 (f) Places a noose on the property of a victim who is or whom the
34 actor perceives to be of a racial or ethnic minority group.

35 This subsection only applies to the creation of a reasonable
36 inference for evidentiary purposes. This subsection does not restrict
37 the state's ability to prosecute a person under subsection (1) of
38 this section when the facts of a particular case do not fall within
39 (a) through (f) of this subsection.

1 (3) It is not a defense that the accused was mistaken that the
2 victim was a member of a certain race, color, religion, ancestry,
3 national origin, gender, or sexual orientation, had a particular
4 gender expression or identity, or had a mental, physical, or sensory
5 disability.

6 (4) Evidence of expressions or associations of the accused may
7 not be introduced as substantive evidence at trial unless the
8 evidence specifically relates to the crime charged. Nothing in this
9 chapter shall affect the rules of evidence governing impeachment of a
10 witness.

11 (5) Every person who commits another crime during the commission
12 of a crime under this section may be punished and prosecuted for the
13 other crime separately.

14 (6) For the purposes of this section:

15 (a) "Gender expression or identity" means having or being
16 perceived as having a gender identity, self-image, appearance,
17 behavior, or expression, whether or not that gender identity, self-
18 image, appearance, behavior, or expression is different from that
19 traditionally associated with the sex assigned to that person at
20 birth.

21 (b) "Sexual orientation" means heterosexuality, homosexuality, or
22 bisexuality.

23 (c) "Threat" means to communicate, directly or indirectly, the
24 intent to:

25 (i) Cause bodily injury immediately or in the future to the
26 person threatened or to any other person; or

27 (ii) Cause physical damage immediately or in the future to the
28 property of a person threatened or that of any other person.

29 (7) Commission of a hate crime offense is a class C felony.

30 (8) The penalties provided in this section for hate crime
31 offenses do not preclude the victims from seeking any other remedies
32 otherwise available under law.

33 (9) Nothing in this section confers or expands any civil rights
34 or protections to any group or class identified under this section,
35 beyond those rights or protections that exist under the federal or
36 state Constitution or the civil laws of the state of Washington.

37 **Sec. 2.** RCW 9.94A.411 and 2021 c 215 s 98 are each amended to
38 read as follows:

39 (1) Decision not to prosecute.

1 STANDARD: A prosecuting attorney may decline to prosecute, even
2 though technically sufficient evidence to prosecute exists, in
3 situations where prosecution would serve no public purpose, would
4 defeat the underlying purpose of the law in question or would result
5 in decreased respect for the law.

6 GUIDELINE/COMMENTARY:

7 Examples

8 The following are examples of reasons not to prosecute which
9 could satisfy the standard.

10 (a) Contrary to Legislative Intent - It may be proper to decline
11 to charge where the application of criminal sanctions would be
12 clearly contrary to the intent of the legislature in enacting the
13 particular statute.

14 (b) Antiquated Statute - It may be proper to decline to charge
15 where the statute in question is antiquated in that:

16 (i) It has not been enforced for many years; and

17 (ii) Most members of society act as if it were no longer in
18 existence; and

19 (iii) It serves no deterrent or protective purpose in today's
20 society; and

21 (iv) The statute has not been recently reconsidered by the
22 legislature.

23 This reason is not to be construed as the basis for declining
24 cases because the law in question is unpopular or because it is
25 difficult to enforce.

26 (c) De Minimis Violation - It may be proper to decline to charge
27 where the violation of law is only technical or insubstantial and
28 where no public interest or deterrent purpose would be served by
29 prosecution.

30 (d) Confinement on Other Charges - It may be proper to decline to
31 charge because the accused has been sentenced on another charge to a
32 lengthy period of confinement; and

33 (i) Conviction of the new offense would not merit any additional
34 direct or collateral punishment;

35 (ii) The new offense is either a misdemeanor or a felony which is
36 not particularly aggravated; and

37 (iii) Conviction of the new offense would not serve any
38 significant deterrent purpose.

1 (e) Pending Conviction on Another Charge - It may be proper to
2 decline to charge because the accused is facing a pending prosecution
3 in the same or another county; and

4 (i) Conviction of the new offense would not merit any additional
5 direct or collateral punishment;

6 (ii) Conviction in the pending prosecution is imminent;

7 (iii) The new offense is either a misdemeanor or a felony which
8 is not particularly aggravated; and

9 (iv) Conviction of the new offense would not serve any
10 significant deterrent purpose.

11 (f) High Disproportionate Cost of Prosecution - It may be proper
12 to decline to charge where the cost of locating or transporting, or
13 the burden on, prosecution witnesses is highly disproportionate to
14 the importance of prosecuting the offense in question. This reason
15 should be limited to minor cases and should not be relied upon in
16 serious cases.

17 (g) Improper Motives of Complainant - It may be proper to decline
18 charges because the motives of the complainant are improper and
19 prosecution would serve no public purpose, would defeat the
20 underlying purpose of the law in question or would result in
21 decreased respect for the law.

22 (h) Immunity - It may be proper to decline to charge where
23 immunity is to be given to an accused in order to prosecute another
24 where the accused's information or testimony will reasonably lead to
25 the conviction of others who are responsible for more serious
26 criminal conduct or who represent a greater danger to the public
27 interest.

28 (i) Victim Request - It may be proper to decline to charge
29 because the victim requests that no criminal charges be filed and the
30 case involves the following crimes or situations:

31 (i) Assault cases where the victim has suffered little or no
32 injury;

33 (ii) Crimes against property, not involving violence, where no
34 major loss was suffered;

35 (iii) Where doing so would not jeopardize the safety of society.

36 Care should be taken to insure that the victim's request is
37 freely made and is not the product of threats or pressure by the
38 accused.

39 The presence of these factors may also justify the decision to
40 dismiss a prosecution which has been commenced.

1 Notification

2 The prosecutor is encouraged to notify the victim, when
3 practical, and the law enforcement personnel, of the decision not to
4 prosecute.

5 (2) Decision to prosecute.

6 (a) STANDARD:

7 Crimes against persons will be filed if sufficient admissible
8 evidence exists, which, when considered with the most plausible,
9 reasonably foreseeable defense that could be raised under the
10 evidence, would justify conviction by a reasonable and objective fact
11 finder. With regard to offenses prohibited by RCW 9A.44.040,
12 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086,
13 9A.44.089, and 9A.64.020 the prosecutor should avoid pre-filing
14 agreements or diversions intended to place the accused in a program
15 of treatment or counseling, so that treatment, if determined to be
16 beneficial, can be provided pursuant to RCW 9.94A.670.

17 Crimes against property/other crimes will be filed if the
18 admissible evidence is of such convincing force as to make it
19 probable that a reasonable and objective fact finder would convict
20 after hearing all the admissible evidence and the most plausible
21 defense that could be raised.

22 See table below for the crimes within these categories.

23 CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

24 CRIMES AGAINST PERSONS

25 Aggravated Murder (RCW 10.95.020)

26 1st Degree Murder (RCW 9A.32.030)

27 2nd Degree Murder (RCW 9A.32.050)

28 1st Degree Manslaughter (RCW 9A.32.060)

29 2nd Degree Manslaughter (RCW 9A.32.070)

30 1st Degree Kidnapping (RCW 9A.40.020)

31 2nd Degree Kidnapping (RCW 9A.40.030)

32 1st Degree Assault (RCW 9A.36.011)

33 2nd Degree Assault (RCW 9A.36.021)

34 3rd Degree Assault (RCW 9A.36.031)

35 4th Degree Assault (if a violation of RCW 9A.36.041(3))

36 1st Degree Assault of a Child (RCW 9A.36.120)

37 2nd Degree Assault of a Child (RCW 9A.36.130)

38 3rd Degree Assault of a Child (RCW 9A.36.140)

39 1st Degree Rape (RCW 9A.44.040)

1 2nd Degree Rape (RCW 9A.44.050)
2 3rd Degree Rape (RCW 9A.44.060)
3 1st Degree Rape of a Child (RCW 9A.44.073)
4 2nd Degree Rape of a Child (RCW 9A.44.076)
5 3rd Degree Rape of a Child (RCW 9A.44.079)
6 1st Degree Robbery (RCW 9A.56.200)
7 2nd Degree Robbery (RCW 9A.56.210)
8 1st Degree Arson (RCW 9A.48.020)
9 1st Degree Burglary (RCW 9A.52.020)
10 1st Degree Identity Theft (RCW 9.35.020(2))
11 2nd Degree Identity Theft (RCW 9.35.020(3))
12 1st Degree Extortion (RCW 9A.56.120)
13 2nd Degree Extortion (RCW 9A.56.130)
14 1st Degree Criminal Mistreatment (RCW 9A.42.020)
15 2nd Degree Criminal Mistreatment (RCW 9A.42.030)
16 1st Degree Theft from a Vulnerable Adult (RCW 9A.56.400(1))
17 2nd Degree Theft from a Vulnerable Adult (RCW 9A.56.400(2))
18 Hate Crime (RCW 9A.36.080)
19 Indecent Liberties (RCW 9A.44.100)
20 Incest (RCW 9A.64.020)
21 Vehicular Homicide (RCW 46.61.520)
22 Vehicular Assault (RCW 46.61.522)
23 1st Degree Child Molestation (RCW 9A.44.083)
24 2nd Degree Child Molestation (RCW 9A.44.086)
25 3rd Degree Child Molestation (RCW 9A.44.089)
26 1st Degree Promoting Prostitution (RCW 9A.88.070)
27 Intimidating a Juror (RCW 9A.72.130)
28 Communication with a Minor (RCW 9.68A.090)
29 Intimidating a Witness (RCW 9A.72.110)
30 Intimidating a Public Servant (RCW 9A.76.180)
31 Bomb Threat (if against person) (RCW 9.61.160)
32 Unlawful Imprisonment (RCW 9A.40.040)
33 Promoting a Suicide Attempt (RCW 9A.36.060)
34 Criminal Mischief (if against person) (RCW 9A.84.010)
35 Stalking (RCW 9A.46.110)
36 Custodial Assault (RCW 9A.36.100)
37 Domestic Violence Court Order Violation (RCW 7.105.450,
38 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26B.050, or 26.52.070,
39 or any of the former RCW 26.50.110 and 74.34.145)
40 Counterfeiting (if a violation of RCW 9.16.035(4))

1 Felony Driving a Motor Vehicle While Under the Influence of
2 Intoxicating Liquor or Any Drug (RCW 46.61.502(6))
3 Felony Physical Control of a Motor Vehicle While Under the
4 Influence of Intoxicating Liquor or Any Drug (RCW 46.61.504(6))
5 CRIMES AGAINST PROPERTY/OTHER CRIMES
6 2nd Degree Arson (RCW 9A.48.030)
7 1st Degree Escape (RCW 9A.76.110)
8 2nd Degree Escape (RCW 9A.76.120)
9 2nd Degree Burglary (RCW 9A.52.030)
10 1st Degree Theft (RCW 9A.56.030)
11 2nd Degree Theft (RCW 9A.56.040)
12 1st Degree Perjury (RCW 9A.72.020)
13 2nd Degree Perjury (RCW 9A.72.030)
14 1st Degree Introducing Contraband (RCW 9A.76.140)
15 2nd Degree Introducing Contraband (RCW 9A.76.150)
16 1st Degree Possession of Stolen Property (RCW 9A.56.150)
17 2nd Degree Possession of Stolen Property (RCW 9A.56.160)
18 Bribery (RCW 9A.68.010)
19 Bribing a Witness (RCW 9A.72.090)
20 Bribe received by a Witness (RCW 9A.72.100)
21 Bomb Threat (if against property) (RCW 9.61.160)
22 1st Degree Malicious Mischief (RCW 9A.48.070)
23 2nd Degree Malicious Mischief (RCW 9A.48.080)
24 1st Degree Reckless Burning (RCW 9A.48.040)
25 Taking a Motor Vehicle without Authorization (RCW 9A.56.070 and
26 9A.56.075)
27 Forgery (RCW 9A.60.020)
28 2nd Degree Promoting Prostitution (RCW 9A.88.080)
29 Tampering with a Witness (RCW 9A.72.120)
30 Trading in Public Office (RCW 9A.68.040)
31 Trading in Special Influence (RCW 9A.68.050)
32 Receiving/Granting Unlawful Compensation (RCW 9A.68.030)
33 Bigamy (RCW 9A.64.010)
34 Eluding a Pursuing Police Vehicle (RCW 46.61.024)
35 Willful Failure to Return from Furlough
36 Escape from Community Custody
37 Criminal Mischief (if against property) (RCW 9A.84.010)
38 1st Degree Theft of Livestock (RCW 9A.56.080)
39 2nd Degree Theft of Livestock (RCW 9A.56.083)

1 ALL OTHER UNCLASSIFIED FELONIES

2 Selection of Charges/Degree of Charge

3 (i) The prosecutor should file charges which adequately describe
4 the nature of defendant's conduct. Other offenses may be charged only
5 if they are necessary to ensure that the charges:

6 (A) Will significantly enhance the strength of the state's case
7 at trial; or

8 (B) Will result in restitution to all victims.

9 (ii) The prosecutor should not overcharge to obtain a guilty
10 plea. Overcharging includes:

11 (A) Charging a higher degree;

12 (B) Charging additional counts.

13 This standard is intended to direct prosecutors to charge those
14 crimes which demonstrate the nature and seriousness of a defendant's
15 criminal conduct, but to decline to charge crimes which are not
16 necessary to such an indication. Crimes which do not merge as a
17 matter of law, but which arise from the same course of conduct, do
18 not all have to be charged.

19 (b) GUIDELINES/COMMENTARY:

20 (i) Police Investigation

21 A prosecuting attorney is dependent upon law enforcement agencies
22 to conduct the necessary factual investigation which must precede the
23 decision to prosecute. The prosecuting attorney shall ensure that a
24 thorough factual investigation has been conducted before a decision
25 to prosecute is made. In ordinary circumstances the investigation
26 should include the following:

27 (A) The interviewing of all material witnesses, together with the
28 obtaining of written statements whenever possible;

29 (B) The completion of necessary laboratory tests; and

30 (C) The obtaining, in accordance with constitutional
31 requirements, of the suspect's version of the events.

32 If the initial investigation is incomplete, a prosecuting
33 attorney should insist upon further investigation before a decision
34 to prosecute is made, and specify what the investigation needs to
35 include.

36 (ii) Exceptions

37 In certain situations, a prosecuting attorney may authorize
38 filing of a criminal complaint before the investigation is complete
39 if:

- 1 (A) Probable cause exists to believe the suspect is guilty; and
2 (B) The suspect presents a danger to the community or is likely
3 to flee if not apprehended; or
4 (C) The arrest of the suspect is necessary to complete the
5 investigation of the crime.

6 In the event that the exception to the standard is applied, the
7 prosecuting attorney shall obtain a commitment from the law
8 enforcement agency involved to complete the investigation in a timely
9 manner. If the subsequent investigation does not produce sufficient
10 evidence to meet the normal charging standard, the complaint should
11 be dismissed.

12 (iii) Investigation Techniques

13 The prosecutor should be fully advised of the investigatory
14 techniques that were used in the case investigation including:

- 15 (A) Polygraph testing;
16 (B) Hypnosis;
17 (C) Electronic surveillance;
18 (D) Use of informants.

19 (iv) Prefiling Discussions with Defendant

20 Discussions with the defendant or his/her representative
21 regarding the selection or disposition of charges may occur prior to
22 the filing of charges, and potential agreements can be reached.

23 (v) Prefiling Discussions with Victim(s)

24 Discussions with the victim(s) or victims' representatives
25 regarding the selection or disposition of charges may occur before
26 the filing of charges. The discussions may be considered by the
27 prosecutor in charging and disposition decisions, and should be
28 considered before reaching any agreement with the defendant regarding
29 these decisions.

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